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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONTE TROYCE WEBSTER, Defendant and Appellant.	G055789 (Super. Ct. No. 17CF1855) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William L. Evans, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Charles C. Ragland and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Donte Troyce Webster was convicted of pimping and pandering. On appeal, defendant challenges his conviction based on evidence he claims was improperly admitted. We reject each of his claims and affirm.

Defendant argues the trial court erred in admitting evidence of an alleged killing by defendant that was unrelated to the charges against him. We conclude defendant's trial counsel failed to object on the proper grounds to the evidence or request a limiting instruction, thereby forfeiting any argument on appeal. Even if we were to consider the argument, we would conclude there was no error, or any error was harmless.

Defendant next argues the court erred by admitting evidence of an investigation into underage sex trafficking, in which defendant was not involved. The investigating and arresting officers became aware of defendant's involvement in pimping and pandering while conducting an investigation of another person (who was also arrested, and whose trial was severed from defendant's). The evidence was relevant to explain how and why the officers were alerted to defendant's crimes. The testimony regarding the other investigation was limited and was not unduly prejudicial.

Finally, defendant argues that the court erred by admitting evidence of defendant's pandering of underage victims into sex trafficking. Again, we conclude defendant forfeited this issue; even if the issue were properly before us, we would conclude either that there was no error or that any error was harmless.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The prosecution of defendant resulted from an investigation conducted by the Orange County Human Trafficking Task Force. The purpose of the task force is to locate potential pimps, panderers, and human traffickers, and to rescue juveniles and other victims of human trafficking. The members of the task force involved in the investigation and arrest of defendant included Costa Mesa Police Detective Alberto Lopez, Orange County Sheriff's Deputy Scott McTigue, Santa Ana Police Officer David

Garcia, Anaheim Police Officer Happy Medina, and California Highway Patrol Investigator Nathan Logan.

On July 20, 2017, Lopez found a solicitation for prostitution in Backpage, an online website; the photograph accompanying the solicitation appeared to Lopez to be of a minor. Using the telephone number on the Backpage solicitation, Lopez called the woman, who told him she was staying at a motel in Anaheim. McTigue set up onsite surveillance at the motel at about 4:00 p.m.

McTigue took the photo from the Backpage solicitation to the motel manager, who informed McTigue the photo resembled the occupant of room 229. The telephone number provided at registration for room 229 was linked to multiple solicitations for prostitution on Backpage. The motel registration revealed the name of the woman in room 229 was Y.E.; a search of the Department of Motor Vehicles website revealed that Y.E. was not the woman in the photo in the original Backpage solicitation.

Garcia, Lopez, Logan, and Medina joined McTigue outside the motel. At about 5:00 p.m., defendant knocked on the door of room 229 and entered, pulling a rolling suitcase behind him. About a half hour later, Y.E. answered the door to accept a pizza delivery. Garcia texted Y.E.'s mobile phone at about 6:00 p.m. and requested a date with the woman in the original Backpage solicitation for that evening. At about the same time, defendant left the motel room and moved his car to the motel parking lot.

After Garcia received a reply that he could have a date, Garcia texted he had 200 roses and asked what he would receive. He received a text reply that he "would get an hour" and he could do "anything you can within the hour." Garcia was told to come to the motel at 8:30 p.m. for his date.

At about 8:30 p.m., Garcia cancelled the date. McTigue and Medina then knocked on the door of room 229; Y.E. identified herself and let the officers in. During a consensual search of room 229, McTigue searched the suitcase defendant had brought to

the room, and found female clothing and other items. Y.E. admitted all the items in the suitcase were hers.

At the same time, defendant was detained in his car in the motel parking lot by Garcia and Logan. Defendant was advised of his rights, and stated he was at the motel to meet up with a woman he had met on a dating website. Defendant denied knowing anyone else at the motel, denied having been inside the motel earlier in the day, and denied knowing Y.E. when shown her photo. The officers found a mobile phone on the driver's side floorboard, which defendant had been holding when the officers approached, and which defendant confirmed was his. Defendant refused to allow the officers to search his mobile phone. The officers found a second mobile phone in the glove compartment, a third mobile phone with a cracked screen, a state benefits card in Y.E.'s name, and refillable debit cards in the center console and back seat of the car, and human services paperwork with Y.E.'s name in the trunk.

Y.E. accompanied the officers to the police station for an interview. With Y.E.'s permission, the officers used her phone to call the person identified as Tae in her contacts. The phone defendant had identified as his rang; the incoming caller was identified as "Bands" followed by emojis of bare feet, a bag marked with a dollar sign, and a dollar sign. Medina testified that in the prostitution industry, "Bands" refers to a stack of bills adding up to a thousand dollars, and the bare feet emoji refers to "a prostitute walking a track with her 10 toes on the ground earning money."

Defendant's Facebook profile page showed "Tae" as part of his profile name. Y.E.'s Facebook profile page showed pictures of her and defendant hugging. When confronted with these social media pages, defendant admitted being in room 229, but still denied knowing Y.E.

A video later recovered from one of defendant's mobile phones showed him boasting about having been "on the blade all night, on International." Defendant also said in the video that "if his ho or bitch fagged off" he would wake up to "30 more toes"

in his bed. Lopez testified the first statement meant defendant had been at a place in Oakland where prostitutes go to solicit sex; the second meant if one of defendant's prostitutes "really screwed up" and failed to make enough money, he would replace her with three other prostitutes. In the video, defendant addressed himself to "P" which Lopez testified meant he was directing his remarks to another pimp.

Multiple pages of screen shots of defendant's text messages with Y.E. were admitted at trial; the text messages relating to the arguments defendant raises on appeal are discussed in detail, *post*. Between July 4 and July 20, 2017, numerous texts were exchanged discussing Y.E.'s work as a prostitute, defendant directing Y.E. to walk in a certain place, Y.E. advising defendant how much money she had made, and defendant directing Y.E. to demand specific amounts of money. There were about 26 messages from Y.E. stating she was on a date or acknowledging defendant had demanded she go somewhere or do something, and more than 20 responses by defendant to those texts. Many of the text messages included statements referencing defendant inflicting physical violence against Y.E., mentally manipulating her, encouraging her to continue working as a prostitute in order to keep defendant happy, defendant's efforts to recruit new girls to work for him, and what spots were good for soliciting. On July 20, before the task force's surveillance began, Y.E. texted defendant that she was in room 229 and had already had a date.

Also on July 20, the members of the task force found two juvenile females in another room at the motel; another alleged pimp, John Nolan Henry III, was arrested.

Y.E. did not testify at trial.

Defendant was charged with one count each of pimping (Pen. Code, § 266h, subd. (a)) and pandering by procuring (*id.*, § 266i, subd. (a)(1)). A jury found defendant guilty of both counts. The trial court sentenced defendant to the midterm of four years in prison for pimping, and stayed a four-year term for pandering, pursuant to Penal Code section 654. Defendant timely filed a notice of appeal.

DISCUSSION

I.

ADMISSION OF EVIDENCE RELATING TO MURDER

Defendant argues the trial court erred by admitting into evidence a series of text messages implicating defendant in an unrelated homicide. We review this issue for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

At trial, the prosecution offered expert testimony that text messages found on defendant's phone were exchanges between defendant and Y.E. These text messages included the following:

Y.E.: "I thot u never hit me but u went back to doin it I'm scared ull kill me"

Defendant: "Well it's go get better"

Y.E.: "*You killed Smokey. What else is left? Me next?*" (Italics added.)[1]

Defendant: "Smh"[2]

Y.E.: "I'm scared"

Defendant: "[T]hen don't fuck with me. It's good"

Before trial, the prosecution filed a motion in limine to introduce these text messages (as well as others) pursuant to Evidence Code section 1101, subdivision (b),[3] on the ground the messages were relevant to show motive, intent, knowledge, plan, and absence of mistake. Defendant objected to the admission of the text messages on grounds of hearsay, violation of the confrontation clause of the Sixth Amendment to the United States Constitution, because their admission would require an undue consumption of time under section 352, subdivision (a), and because of violations of discovery rules

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[1] When the exhibits were provided to the jury for deliberations, the italicized message was blacked out.

[2] The expert explained "SMH" means "shake my head."

[3] All further undesignated statutory references are to the Evidence Code.

under Penal Code section 1054.1. The court ruled the messages admissible, rejecting each of the grounds raised by defendant.

After the prosecution rested its case, defendant objected to the text messages under section 352, subdivision (b), on the ground they were unrelated to the subject matter and were highly prejudicial; the court overruled the objection.

The Attorney General first argues that defendant has forfeited his challenge by failing to object in the trial court that the text messages were highly prejudicial.[4] "'In accordance with [section 353, subdivision (a)], we have consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.'" (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

Before trial, defendant objected that the text messages were hearsay, denied defendant his right to confrontation, were delayed discovery, and should be excluded under section 352 because their admission would require multiple offers of proof to establish who sent each message and "would [therefore] cause an undue consumption of time which would be, I guess, a 352 objection." Defendant's objection was based on section 352, subdivision (a), not subdivision (b).[5]

Further, defendant did not object to the text messages at the time they were offered in evidence, but waited until after the prosecution had rested its case. """[W]hen an *in limine* ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal."""" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1108.) The objection could be

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[4] Defendant did not file an appellate reply brief, and therefore has not addressed this argument.

[5] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

preserved by "'a sufficiently definite and express ruling on a motion in limine'" (*ibid.*) but, as explained *ante*, the objection based on prejudice was not raised in opposition to the motion in limine, and therefore was not ruled on by the trial court.

The objection on grounds of prejudice first raised after the prosecution rested its case was untimely. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) We conclude defendant forfeited his claim. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) We will nevertheless address the issue on its merits to address defendant's claim of ineffective assistance of counsel.

The text messages were properly admitted to show that Y.E. was scared of defendant, and that defendant used violence against Y.E. to keep her under his control.

Defendant also argues the trial court erred by failing to give a limiting instruction as to the text messages regarding the murder of Smokey. At no time did defendant request a limiting instruction from the trial court. A trial court has no sua sponte duty to give a limiting instruction, and defendant's failure to request a limiting instruction forfeits the issue on appeal. (*People v. Sánchez* (2016) 63 Cal.4th 411, 460.)

While the trial court did agree that it would "admonish the jury regarding much of this stuff," defendant neither suggested a limiting instruction nor objected to the lack of such an instruction when the instructions were discussed. Defendant did not object to CALCRIM No. 357 regarding adoptive admissions. The court tailored CALCRIM No. 375 regarding evidence of uncharged offenses to address other pimping and pandering activities, but defendant did not request that the instruction be further tailored to add reference to the alleged killing of Smokey. Defendant raised no other objections to the instructions.

Even if the trial court had erred, such error would be harmless. The reference to Smokey's murder when the text messages were being read during the officers' testimony (which was italicized *ante*) was redacted from trial exhibit 14, which contains the screenshots of the text messages between defendant and Y.E., before being

provided to the jury. In light of the number of messages read to the jury during the prosecution's presentation of its case, it is unlikely the jury placed too much emphasis on testimony regarding Smokey. Further, defendant's trial counsel could reasonably decide it was better not to have a limiting instruction so as not to draw additional attention to that testimony when the actual text message that would be before the jury during deliberations had been redacted to exclude it. In light of the significant number of texts between Y.E. and defendant, there was little likelihood the jury would focus on the testimony regarding this single one. This decision was not objectively unreasonable. (*People v. Stanley* (2006) 39 Cal.4th 913, 954 [""[W]e accord great deference to counsel's tactical decisions""].)

Defendant's claim that his trial counsel's failure to object or request a limiting instruction was ineffective assistance of counsel also fails. To prevail on a claim of ineffective assistance of counsel, defendant must prove by a preponderance of the evidence that his trial counsel's representation failed to meet an objective standard of reasonableness, and that absent counsel's deficient performance, there is a reasonable probability the result would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

As explained *ante*, defendant cannot establish either prong of the *Strickland v. Washington* test. The text "You killed Smokey. What else is left? Me next?" was redacted from the exhibit made available to the jury during deliberations. Defendant's trial counsel could have made a tactical decision not to request a limiting instruction.

Defendant also cannot show that he was prejudiced by his trial counsel's failure to object to or request a limiting instruction regarding the text message about Smokey. Defendant and Y.E. exchanged numerous texts that implicated defendant in the business of pimping and pandering. Defendant entered the room in which Y.E. was conducting prostitution and carried with him a suitcase of Y.E.'s clothing and other items. Y.E. had defendant's contact information in her cell phone, and an incoming call

from Y.E. registered on defendant's phone with emojis of bare feet, a bag marked with a dollar sign, and a dollar sign. Y.E.'s personal identification cards and untraceable refillable debit cards were found in defendant's car. Defendant's behavior was consistent with that of a pimp watching out for the prostitutes in his employ. His unreasonable denials about knowing Y.E. provided further support of his guilt. Substantial direct and circumstantial evidence of defendant's guilt was presented to the jury. The outcome would not have been different if the evidence regarding Smokey had not been presented to the jury.

II.

ADMISSION OF EVIDENCE OF INVESTIGATION INTO UNDERAGE PROSTITUTION

Defendant also argues the trial court erred by permitting the prosecution to introduce evidence that the initial investigation was of suspected underage prostitution. Before trial, defendant moved to exclude any reference to John Nolan Henry III, whose case was severed from defendant's before trial. Defendant's pimping and pandering activities were discovered during the investigation into Henry's activities. Defendant argued that any reference to the investigation of Henry would be prejudicial because Henry was suspected of pandering minors. The prosecution stated that it would present "very limited" evidence regarding the initial investigation into Henry's activities. The prosecution also offered to stipulate that defendant "had nothing to do with the other two girls." The prosecution sought to offer some evidence regarding the investigation of Henry to provide context and background for the investigation of Y.E. and defendant.

The trial court denied defendant's pretrial motion, stating it would "permit the People to certainly provide to the jury the context in which they came to the conclusion that Mr. Webster was somehow involved without undue consumption of court time about the other guy's activities."

The Attorney General initially argues that defendant forfeited his contention of evidentiary error because he failed to object when the evidence was offered

at trial. In this instance, we believe the trial court's ruling before trial was a sufficiently definite and express ruling so as to preserve the issue for appeal. (*People v. Thompson*, *supra*, 1 Cal.5th at p. 1108.)

Defendant's appellate counsel and the Attorney General cite the same testimony by the members of the task force in analyzing whether the evidence of the Henry investigation was properly admitted. Defendant contends that the officers spent "considerable time" testifying "extensively that the initial investigation, and their involvement on the Human Trafficking Task Force involved rescuing underage girls from forced prostitution and sex trafficking." The Attorney General, by contrast, argues the testimony was "not cumulative" and consisted of "brief and general information about the initial investigation that was necessary to provide context for the resulting investigation" of defendant. The trial court exercised its discretion in determining that the testimony was admissible and was neither cumulative nor prejudicial. We find no abuse of discretion.

Defendant also argues the trial court erred by not advising the jury of the parties' stipulation that the investigation of suspected underage sex trafficking was unrelated to defendant. The nature of a stipulation, of course, requires an agreement by the parties. Defendant cannot fault the trial court for failing to advise the jury about a stipulation that he did not propose to the court or formally request be given to the jury.

In any event, task force officers provided testimony that defendant was not involved in underage sex trafficking. McTigue testified that a second man seen at the motel, who was not defendant, was the person involved with the underage females. Garcia testified the underage female subjects were found in another room of the motel, Henry was arrested in connection with the investigation involving underage females, and the investigation of defendant was separate from that investigation. Logan testified there were two investigations going on at the motel the same evening. Lopez testified two girls

were found at the same motel during a separate investigation that did not involve defendant.

III.

ADMISSION OF TEXT MESSAGES RELATING TO UNDERAGE PROSTITUTES

Defendant argues the trial court erred by allowing the admission of text messages between defendant and Y.E. regarding attempts to recruit young women to act as prostitutes for defendant. Before trial, the prosecution sought admission of the text messages pursuant to section 1101, subdivision (b), to show motive, intent, knowledge, plan, and absence of mistake. Defendant objected to the evidence on numerous grounds, including under section 352, subdivision (a). The trial court ruled the text messages admissible.

Defendant did not again object when the text messages were read at trial. After the prosecution completed presenting its case, defendant renewed his pretrial objections. Defendant, however, never objected to the text messages based on their alleged prejudicial impact. As with the earlier analysis of the text messages regarding Smokey, we will address this issue on its merits, despite defendant's forfeiture of the argument, to forestall a later claim of ineffective assistance of counsel. (*People v. Williams, supra,* 17 Cal.4th at p. 161, fn. 6.)

The challenged text messages read as follows:

Defendant: "Make sure u get Emma number"

Y.E.: "them bitches 16 [¶] What them bitches talking bout"

Defendant: "They chosed [¶] She told u she 16"

Y.E.: "They look 16 they don't even have shoes I asked her where her shoes she said In the room like a Lil girl n these bitches said they is idk for sure but they look [¶] like it [¶] I need to smoke"

Defendant: "Ok I got u"

Lopez testified that Y.E. was warning defendant "that someone he might have been trying to recruit was underage," and defendant was not concerned. Lopez testified that this exchange indicated that one of the prospective underage prostitutes had chosen to work with defendant, and the other had chosen to work with another pimp named Blessed. Lopez also testified that prostitutes are often directed by their pimps to recruit other girls to work for the pimp.

These text messages were highly probative of the pimping and pandering charges against defendant. They were not unduly prejudicial. There is no reasonable probability that the outcome of the case would have been more favorable to defendant if they had been excluded from trial. Therefore, we find no prejudicial error.

DISPOSITION

The judgment is affirmed.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

GOETHALS, J.